IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 16-0739

ALPS PROPERTY & CASUALTY INSURANCE COMPANY, d/b/a Attorneys Liability Protection Society, a Risk Retention Group,

Plaintiff and Appellees,

v.

McLEAN & McLEAN, PLLP; DAVID McLEAN; MICHAEL McLEAN; and MIANTAE McCONNELL,

Defendants and Appellants.

McLEAN & McLEAN, PLLP and MICHAEL McLEAN,

Counter Plaintiffs and Appellants,

v.

ALPS PROPERTY & CASUALTY INSURANCE COMPANY,

Counter Defendants and Appellees.

JOSEPH F. MICHELETTI and MARILYN C. MICHELETTI,

Intervenors and Appellants.

On Appeal from the Montana Third Judicial District Court,
Deer Lodge County, Cause No. DV-14-82
Hon. James A. Haynes

Opening Brief of Joseph F. Micheletti and Marilyn C. Micheletti

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INTRODUCTION

COME NOW intervenors/appellants Joseph F. Micheletti and Marilyn C. Micheletti, by and through their counsel of record, Fleming & O'Leary, PLLP, and submit this opening brief in support of their appeal of the decision of district court granting plaintiff/appellee ALPS Property & Casualty Insurance Company d/b/a Attorneys Liability Protection Society, A Risk Retention Group, summary judgment in this matter.

STATEMENT OF THE ISSUE PRESENTED

Did the district court err in finding that ALPS Property & Casualty Insurance Company properly rescinded its legal malpractice policy; err by finding that professional liability/legal malpractice claims were not afforded coverage under this policy; and, err by finding that the policy was void *ab initio*, thereby denying coverage to third party claimants?

STATEMENT OF THE CASE

On October 8, 2014, plaintiff/appellee ALPS Property & Casualty Insurance Company d/b/a Attorneys Liability Protection Society, A Risk Retention Group (ALPS) filed this cause of action, seeking a declaratory judgment, and damages, including costs and attorneys' fees, against defendants/appellants McLean and McLean, PLLP, David McLean, Michael McLean (McLean), Lillian Johnson, and Miantae McConnell. ALPS sought to rescind a professional liability insurance

policy, identified as Lawyers Professional Liability Insurance Policy No. ALPS7804-11 (Policy) (See; Doc. 35, Ex. 8, and Appendix to Joint Opening Brief of McLean & McLean, PLLP. And Michael McLean (App.), Tab 9)[1], issued to McLean, for their law practice, located in Anaconda, Montana. ALPS also sought to preclude coverage under the Policy for the claims of Johnson and McConnell, who were clients of McLean. These claims resulted from alleged negligence by Attorney David McLean.[2] On December 2, 2015, ALPS moved the district court for summary judgment. (Doc. 33).

On October 16, 2015, intervenors/appellants Joseph F. Micheletti[3] and Marilyn C. Micheletti (Michelettis) moved the district court to intervene in this matter, on the basis that the determination of such would impact their rights and potential obligations owed to them under the Policy. (Doc. 30). More specifically, as Michelettis had asserted claims for legal malpractice/professional negligence against McLean, the issues raised by ALPS as to the availability of coverage under the Policy directly effected Michelettis.

On December 3, 2015, the district court granted Michelettis' motion for

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[1] Pursuant to Mont. R. App. P. 12(5), Michelettis join in and adopt the Appendix to Joint Opening Brief of McLean & McLean, PLLP and Michael McLean.

[2] David McLean has been disbarred and is serving a federal prison term as the result of his theft of client and others' funds.

[3] Joseph F. Micheletti passed away on January 20, 2017. A motion for substitution under Mont. R. App. P. 25(1) will be filed when a personal representative for his estate is appointed.

intervention. (Doc. 37). On January 15, 2016, Michelettis filed an answer to ALPS' complaint, and asserted a counterclaim for declaratory judgment that the Policy provided coverage for their claims brought against McLean.[4] (Doc. 41).

On June 22, 2016, the district court granted ALPS summary judgment against McLean. (Doc. 47; App., Tab 3). On July 25, 2016, Michelettis filed their cross motion for summary judgment (Doc. 50), with a combined brief in opposition to the motion filed by ALPS, and in support of their motion. (Doc. 49). Michelettis also submitted affidavits in support of their motion and brief. (Doc. 51 and 52). Michelettis asserted that existing Montana law and public policy as to the interpretation of insurance contracts provided that they should be entitled to the protections and proceeds of the Policy.

On September 19, 2016, the district court granted ALPS summary judgment and denied Michelettis' cross motion for summary judgment. (Doc. 62; App., Tab 2). The district court found that ALPS had rescinded the Policy as required by the applicable Montana statutes; that the individual actions of David McLean violated the requirements of the Policy; and, that the Policy was void *ab initio.* (Id. p. 38.) Judgment was entered on behalf of ALPS on November 14, 2016. (Doc. 67, App.,

[4] Michelettis had placed ALPS on notice of their claims on October 16, 2014 (Doc. 51, ¶ 11, and Doc. 52, ¶ 11), and filed a cause of action against McLean for professional negligence/legal malpractice on July 17, 2015. (See: Joseph F. Micheletti and Marilyn C. Micheletti, Plaintiffs, vs. McLean & McLean, PLLP, and David M. McLean, Defendants, Cause No. DV-15-67, Montana Third Judicial District Court, Anaconda-Deer Lodge County. Doc. Exhibit.)

Tab 1).

Appellants Michelettis, McLean, and defendant/appellant Miantae McConnell now appeal that judgment.

STATEMENT OF FACTS

On December 26, 2009, appellant Joseph F. Micheletti (Joe) suffered severe injuries as the result of a slip and fall accident, which occurred at the Costco Wholesale Store in Westminster, Colorado. Joe and his wife, appellant Marilyn C. Micheletti (Marilyn), who resided in Anaconda, Montana, were visiting family in Westminster for the Christmas holiday. The accident occurred when an employee of Costco, who was pushing a row of shopping carts into the store entranceway, apparently did not see Joe, who fell while attempting to avoid the shopping carts. (Doc. 52, Affidavit of Joseph F. Micheletti, ¶¶ 1 and 2; and, Doc. 51, Affidavit of Marilyn C. Micheletti, ¶¶ 1 and 2).

As the result of his injuries, Joe required emergency medical treatment and hospitalization in Westminster, Colorado. Upon Marilyn and his return to Anaconda, Joe's injuries required additional medical treatment, including surgery, physical therapy, and prescription medication. (Doc. 52, ¶¶ 2 and 3).

Joe and Marilyn have known and been friends with David McLean for over 65 years. Joe and Marilyn have also been represented in various legal matters by David McLean. Due to these existing relationships, on or about January 27, 2010,

Marilyn and Joe met with David McLean, at the law offices of McLean & McLean PLLP, in Anaconda, Montana. At that time, Marilyn and Joe retained McLean to represent them and provide legal services, on a contingent fee basis, for any and all claims for injuries and damages which they had against Costco, resulting from the accident Joe suffered on December 26, 2009. (Doc. 52, ¶ 4; and, Doc. 51, ¶ 4).

Thereafter, Joe and Marilyn had minimal contact with McLean; were not kept informed as to the status of their claims against Costco; and, never received any written information concerning such from McLean. David McLean repeatedly assured Joe and Marilyn that he was diligently pursuing the case against Costco. (Doc. 52, ¶ 5; and, Doc. 51, ¶ 5). Michelettis were aware, from conversations with David McLean that a lawsuit on their behalf had been filed by McLean against Costco. (See: Joseph Micheletti and Marilyn Micheletti, his wife, Plaintiffs, vs. Costco Wholesale Corporation, Defendant, Cause No. DV-12-113, Montana Third Judicial District Court, Anaconda-Deer Lodge County. (Micheletti v. Costco.)) However, they were never provided a copy of the complaint filed, nor provided copies of any filings in the case by McLean. (Doc. 52, ¶ 6; and, Doc. 51, ¶ 6).

Michelettis were never given a copy of the answer filed by Costco in Micheletti v. Costco. (Doc. 52, ¶ 7; and, Doc. 51, ¶ 7). They were never informed by McLean that Costco alleged that, as Joe's accident had occurred in the State of Colorado, Colorado law applied to their claims, and that such claims were,

therefore, barred by the applicable Colorado statute of limitations. (Doc. 52, ¶ 8; and, Doc. 51, ¶ 8). (See also; C.R.S.A. § 13-80-102(1)(a)).

Neither Joe nor Marilyn were ever informed or advised by McLean that their claims for personal injuries against Costco were potentially time-barred by the applicable Colorado statute of limitations, which is two (2) years. (C.R.S.A. § 13-80-102(1)(a). Joe and Marilyn later learned that their lawsuit was not filed until December 21, 2012. McLean also failed to inform Joe and Marilyn that their claims against Costco should have been brought in the State of Colorado. McLean also failed to advise Joe and Marilyn that counsel licensed in the State of Colorado should have been consulted and/or retained to assist in the pursuit of these claims. (Doc. 52, ¶ 8; and, Doc. 51, ¶ 8).

In September 2014, Joe and Marilyn were informed by McLean that David McLean had been suspended from the practice of law, and that the firm was dissolving. McLean also advised that Joe and Marilyn would need to retain new counsel to represent them in the Micheletti v. Costco matter. (Doc. 52, ¶ 9; and, Doc. 51, ¶ 9).

Joe and Marilyn later learned that, on or about July 22, 2014, David McLean had reported to the Office of Disciplinary Counsel for the State of Montana that he had misappropriated client funds and misappropriated funds of the American Board of Trial Advocates, and that he had been suspended from the practice of

law. Joe and Marilyn subsequently learned that David McLean had been disbarred, and that he was sentenced to federal prison for crimes he committed. (Doc. 52, ¶ 10; and, Doc. 51, ¶ 10).

On October 14, 2014, Joe and Marilyn retained new counsel to represent them in the Micheletti v. Costco lawsuit, and to pursue any claims they may have against McLean, resulting from the failures to properly represent them. By letter dated October 16, 2014, their counsel advised McLean of such, and requested that it place its liability insurer on notice of the Micheletti claims for professional negligence/legal malpractice against McLean. (Doc. 52, ¶ 11; Doc. 51, ¶ 11; and Doc. 30, Ex. B, attached thereto).

On May 13, 2015, Joe and Marilyn agreed to a settlement of their claims in the Micheletti v. Costco litigation. They agreed to the settlement offered based on Costco's stated intention to pursue dismissal of their claims, based on the applicable Colorado statute of limitations, if the settlement amount offered was no accepted. Joe and Marilyn believe that the settlement amount offered was substantially less than what they would have been entitled to as reasonable compensation for their injuries and our damages had these claims against Costco been timely filed and properly handled by McLean. (Doc. 52, ¶¶ 12 and 13; and Doc. 51, ¶¶ 12 and 13).

Joe and Marilyn relied on McLean to properly represent their interests and pursue all claims they had against Costco in a competent, timely, and professional manner. Both Joe and Marilyn assumed, and therefore relied on the fact that McLean maintained professional liability insurance. McLean never advised Joe or Marilyn that, as of December 26, 2011, a lawsuit should have been filed against Costco, and that the failure to do so was malpractice/negligence. (Doc. 52, ¶¶ 14 and 15; and Doc. 51, ¶¶ 14 and 15). As the direct result of the actions and inactions of McLean, Michelettis have suffered injuries and damages. (Doc. 52, ¶¶ 17; and Doc. 51, ¶¶ 17).

STANDARD OF REVIEW

The standard of review in appeals from summary judgment rulings is *de novo*. Blair v. Mid-Continent Cas. Co., 2007 MT 208, ¶ 14, 339 Mont. 8, 167 P.3d 888. This court applies the same Mont. R. Civ. P. 56 criteria as the district court, and summary judgment may be granted only when the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show no genuine issues of matter fact exist and when the moving party is entitled to judgment as a matter of law. Landa v. Assurance Co., 2013MT 217, ¶ 13, 371 Mont. 202, 307 P.3d 284. The supreme court reviews a district court's conclusions of law to determine whether they are correct and its findings of fact to determine whether

they are clearly erroneous. Pilgeram v. GreenPoint Mortgage, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839.

Under applicable Montana law, the interpretation of insurance contracts is a question of law for the courts. Marie Deonier & Assocs. v. Paul Revere Life Ins. Co., 2000 MT 238, ¶ 45, 301 Mont. 347, 9 P.3d 622. Therefore, the supreme court reviews the district court's legal conclusions for correctness. Landa v. Assurance Co., 2013MT 217, ¶ 13, 371 Mont. 202, 307 P.3d 284. General rules of contract law apply and the court construes insurance policies against the insurer and in favor of the insured. Parker v. Safeco Ins. Co., 2016 MT 173, ¶ 14, 384 Mont. 125, 376 P.3d 114. The language of the policy governs if it is clear and explicit. Ambiguities are construed against the insurer. Exclusions from coverage will be narrowly and strictly construed because they are contrary to the fundamental protective purpose of an insurance policy. Deonier, 2000 MT 238, ¶ 45, 301 Mont. 347, 9 P.3d 622.

The terms of an insurance policy must be interpreted according to their "... usual, common sense meaning as viewed from the prospective of a reasonable consumer of insurance products." Dakota Fire Ins. Co. v .Oie, 1998 MT 288, ¶15, 291 Mont. 486, 968 P.2d 1126. An ambiguity exists when a contract taken as a whole is reasonably subject to two different interpretations. Jacobsen v. Farmers Union Mut. Ins. Co., 2004 MT 72, ¶19, 320 Mont. 375, ¶19, 87 P.3d 995, ¶19. If

the policy language is ambiguous as applied to the facts of a case, the construction most favorable to the insured should be adopted. Bauer Ranch v. Mountain W. Farm Bur. Mut. Ins, 215 Mont. 153, 695 P.2d 1307, 1309 (1985). Exclusions or words of limitation in an insurance policy must be strictly construed against the insurer regardless of any ambiguity. Wellcome v. Home Insurance Co., 257 Mont. 354, 849 P.2d 190 (1993). Exclusions from coverage are to be narrowly and strictly construed because they are contrary to the fundamental protective purpose of an insurance policy. Swank Enterprises v. All Purpose Services, 2007 MT 57, ¶ 27, 336 Mont. 197, 154 P.3d 52.

Because insurance contracts are adhesion contracts written by the insurance company, and because the purpose of such policies is to provide the consumer protection, the supreme court has adopted rules of construction which favor the insured when policies are ambiguous. Bauer Ranch, Inc. v. Mountain West Farm Bureau, 215 Mont. 153, 695 P.2d 1307 (1985); Liebrand v. National Farmers Union, 272 Mont. 1, 898 P.2d 1220 (1995).

The supreme court has approved the Restatement (Second) of Contracts § 304 (1981), which provides that a promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty. Harman v. MIA Serv. Contracts, 260 Mont. 67, 72, 858 P.2d 19, 22 (1992).

SUMMARY OF ARGUMENT

Michelettis have asserted professional negligence/legal malpractice claims against McLean which result from negligent acts, errors, and omissions committed in the course of its legal representation of Michelettis. In summary, the failure of McLean to properly pursue, investigate, and timely file a personal injury lawsuit resulted in damages to Michelettis.

The illegal and intentional actions of David McLean, which culminated in his imprisonment, had nothing to do with the failure to properly pursue Michelettis' lawsuit. Whether or not David McLean should have recognized and reported the fact of his negligence is a question which remains unanswered anywhere in the record. Nevertheless, ALPS asserted, and the district court relied on and concluded, that David McLean should have recognized and reported such, and that his failure to do so was so significant as to warrant the denial of any insurance coverage to Michelettis for their malpractice claims against McLean.

The legal absurdity of allowing this decision to stand is best illustrated by the fact that ALPS would exclude the benefit of liability insurance coverage to Michelettis, who are innocent third parties, by relying on the same pattern of illegal acts and intentional misstatements of David McLean it relied on to rescind the Policy. However, as to Michelettis, ALPS now cloaks this assertion by claiming that David McLean should have recognized and reported his negligence in the

course of his representation of Michelettis. While the intentional actions of David McLean have no relationship to his failure to properly provide competent legal representation to the Michelettis in pursuit of their claims against Costco, such may explain, in part, his failure to do so.

Regardless, once these failures were discovered, it would certainly be within the reasonable expectations of Michelettis that their claims, based solely on professional negligence/legal malpractice against McLean, would be covered by the Policy issued by ALPS to McLean. To sustain the district court's decision allowing ALPS to deny coverage to Michelettis, by relying on the misstatements of David McLean, would not be within the reasonable expectations of consumers of insurance in Montana, and would be contrary to the public policy of Montana in favor of insurance protection. The district court's ruling is contrary to the numerous Montana precedents which require that policy exclusions from coverage are to be narrowly and strictly construed because such are contrary to the fundamental protective purpose of an insurance policy.

ARGUMENT

Michelettis should be afforded the insurance coverage provided under the ALPS Policy issued to McLean.

The issue of the rights of third-party beneficiaries to the proceeds of a professional liability policy upon rescission by the insurer would seem to be a case

of first impression in Montana. However, within the context of legal malpractice and professional negligence, it would seem contrary to the laws and policies of the State of Montana, in addition to the core values of the Montana Bar, to allow ALPS to benefit from the intentional and illegal actions of one of its insureds, and to use such to deny coverage to other innocent insureds, and to deny injured third-party clients the benefits of liability coverage which should be available.

The Policy, at issue herein, provides, at relevant parts, as follows:

> Subject to the **Limit of Liability**, exclusions, conditions and other terms of this **Policy**, the **Company** agrees to pay on behalf of the **Insured** all sums (in excess of the Deductible amount) that the **Insured** becomes legally obligated to pay as **Damages**, arising from on in connection with A **CLAIM** FIRST MADE AGAINST THE **INSURED** AND FIRST REPORTED TO THE **COMPANY** DURING THE **POLICY PERIOD**, provided that:
>
> 1.1.1 the **Claim** arises from an act, error, omission or **Personal Injury** that happened on or after the **Loss Inclusion Date** and the **Retroactive Coverage Date** set forth in Items 2 and 3 of the Declarations, and that the **Claim** arises from or is in connection with:
>
> (a) an act, error or omission in **Professional Services** that were or should have been rendered by the Insured, or
>
> (b) a Personal Injury arising out of the **Professional Services** of the **Insured**;
>
> 1.1.2 at the effective date of this **Policy**, no **Insured** knew or reasonably should have known or foreseen that the act, error, omission or **Personal Injury** might be the basis of a **Claim**; and
>
> 1.1.3 the **Claim** is not otherwise covered under any other insurance policy that the **Company** has issued to the **Named Insured**.

(App., Tab. 9, Doc. 35, Ex. 8, p. 9).

The Policy includes the following definitions:

> 2.15 **Insured** means:
>
> 2.15.1 The **Named Insured** listed in Item 1 of the Declarations;
>
> 2.15.2 An **Attorney** who is, at the time a **Claim** is first made, or who was, at the **Effective Date** of the **Policy**, a partner, stockholder or employee of the **Named Insured**, and who is or was identified in Item 2 of the Declarations, provided that the requirements of this Policy concerning amendment of Item 2 have been complied with, and solely for **Claims** arising from such **Attorney's Professional Services** on behalf of the **Named Insured** or a **Predecessor Firm**, performed on or after the **Attorney's Retroactive Coverage Date**, and solely to the extent no other insurance or extension of insurance applies;

(App., Tab. 9, p. 10).

The policy also provides:

> 3.1 THIS POLICY DOES NOT APPLY TO ANY CLAIM ARISING FROM OR IN CONNECTION WITH:
>
> 3.1.1 Any dishonest, fraudulent, criminal, malicious, or intentionally wrongful or harmful act, error or omission committed by, at the direction of, or with the consent of an Insured, or any Personal Injury arising from such conduct, subject to Section 4.3 of the Policy ("innocent insured coverage").

(Id., p. 15).

1. Material questions of fact precluded the district court from granting ALPS summary judgment based.

In its Opinion and Order[5], entered September 19, 2016, the district court found that the Michelettis' claims against David McLean and McLean & McLean, PLLP, did not fall within the basic scope of coverage, because as of January 1, 2014, David McLean knew or should have known that the acts, errors, or omissions giving rise to such might result in claims against him. (Doc. 62, p. 20).[6] Absent the benefit of any evidence in the record to support this finding of fact, the district court simply adopted the argument of ALPS that David McLean should have known such because the statute of limitations had been raised as an affirmative defense by Costco. (Doc. 62, pp. 21-22). Rather than identifying this obvious question of fact, the district court then relied on the language of the Policy (Section 1.1.2) to conclude that David McLean should have known or reasonably foreseen that his actions in the course of his representation of the Michelettis might be the basis of a claim. (Id., p. 20).

[5] The district court incorporated by reference its Opinion and Order, entered June 16, 2016, as part of this Opinion and Order. As its response to the district court's decision that the rescission of the Policy by ALPS met the statutory requirement of Montana law, and that the policy was properly rescinded as to the McLean appellants, and void *ab initio*, Michelettis hereby adopt and join in the brief and arguments of McLean as to these issues.

[6] A copy of the district court's Order and Opinion, is also attached in the Appendix to this brief, pursuant to Mont. R. App. P. 12(1)(i).

In support of this conclusion, the district court relied on the decision of the supreme court in Carlson v. Morton, 229 Mont. 234, 745 P.2d 1133 (1987), to support its factual conclusion that David McLean should have recognized and report to ALPS his potential errors. In Carlson, which primarily addresses the issue of the requirement of expert witnesses in legal malpractice actions, the court's decision notes certain instances of legal malpractice which are so obvious that no reasonable juror could not comprehend the lawyer's breach of his duty. These instances included the failure to file suit within the appropriate statute of limitations. 229 Mont. 234, 240-41, 745 P.2d 1133, 1137-38.

Based on Carlson, the district court then decided herein that no reasonable juror would conclude that an attorney responsible for a case, who receives a pleading alleging that a lawsuit was not timely filed, would not have known that such failure might be the basis of a legal malpractice claim. (Doc. (Doc. 62, p. 22-23).

Contrary to the district court's factual finding, the available record as to this issue does not support its conclusion, and establishes that questions of fact exist as to what David McLean should have known and done. As set forth in the Affidavits of the Michelettis, following Joe's accident on December 26, 2009, they retained McLean on January 27, 2010, and were aware that a lawsuit had been filed against Costco. Contrary to the conclusion of the district court as to the applicability of

the statute of limitations and David McLean's knowledge of such, the only fact in the record is that Michelettis ultimately settled their case with Costco, albeit for an amount offered which they believed, and now contend as part of their claims against McLean, was less than the value of their claims. However, none of the facts address what David McLean knew or should have known at the time he was representing Michelettis in the Costco lawsuit.

Based on the record before the district court, certainly questions of fact exist as to what the reasonable knowledge of David McLean was, and his actions and inactions taken in the course of the representation of Michelettis. For example, David McLean may have concluded that, since Costco never contested the venue of lawsuit filed in Montana as the result of an accident in Colorado, nor contested the jurisdiction of the Montana district court, that Montana law would apply to Michelettis' claims. Contrary to the contention of ALPS and the district court's findings otherwise, none of these questions were resolved in the record. Again, the material question of fact as to what David McLean should have reasonably known remains unanswered anywhere in the record. Questions of material fact preclude summary judgment, and determination of such is necessary to resolve the application of the coverage provisions of the Policy. See; Employers Mutual Cas. Co. v. Fisher Builders, 2016 MT 91, 383 Mont. 187, 371 P.3d 375.

2. Michelettis had a reasonable expectation of coverage and are third-party beneficiaries of the Policy.

As set forth in their affidavits, Michelettis had a reasonable expectation and relied that McLean carried professional liability insurance coverage. Likewise, pursuant to applicable Montana law, Michelettis are intended third-party beneficiaries of the Policy which ALPS sold and issued to McLean, and should be afforded coverage. Michelettis' claims against McLean result solely from professional negligence/legal malpractice, and should be covered under the Policy.

The objectively reasonable expectations of applicant and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. Transamerica Ins. Co v. Royle, 202 Mont. 173, 656 P.2d 820 (1983). The genesis of this doctrine is the judicial recognition that most insurance contracts rather than being the result of anything resembling equal bargaining between the parties, are truly contracts of adhesion in which may insureds face two options: (1) accept the standard insurance policy offered by the insurer, or (2) go without insurance. Giacomelli v. Scottsdale Ins. Co., 2009 MT 418, ¶ 42, 354 Mont. 15, 221 P.3d 666.

Mont. Code Ann. § 33-15-316 provides:

> Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, modified by any rider, endorsement, or application which is part of the policy.

In Meadow Brook, LLP v. First American Title Ins. Co., 2014 MT 190, ¶ 16, 375 Mont. 509, 329 P.3d 608, in discussing the reasonable expectations doctrine, the supreme court stated:

> The question of whether a provision is sufficiently "clear" to render the reasonable expectations doctrine inapplicable is different from the question of whether a provision is ambiguous. "If the reasonable expectations doctrine only applied when a provision was ambiguous, there would be no need for the doctrine, as Montana law independently construes ambiguous provisions against the insurer and in favor of coverage." (citing, Fisher v. State Farm Mut. Ins. Co., 2013 MT 208, ¶ 19, 371 Mont. 147, 305 P.3d 861.) Accordingly, it is unnecessary for us to determine whether the specific policy language was ambiguous as a predicated to addressing the District Court's application of the reasonable expectations doctrine.

In Meadow Brook, the supreme court affirmed the district court's finding that a developer's expectation that an endorsement to a title insurance policy provided coverage for future access claims was objectively reasonable. ¶ 17.

The district court herein, relying on Meadow Brook, held that the language of the Policy was clear and the reasonable expectations doctrine did not apply. Contrary to their affidavits, and despite the absence of any evidence contradicting such, the court stated that it did not have any reasonable basis to conclude that Michelettis believed that McLean had liability insurance coverage. As the district

court had previously ruled that the coverage afforded to McLean was void based solely on the statements of David McLean, it applied this ruling to the third parties, including Michelettis.

In further support of its conclusion that the reasonable expectations doctrine did not apply to the claims of the Michelettis, the district court reiterated its finding, again absent any factual basis, that the failure of David McLean to know, or reasonably know or foresee, that his actions might be the basis of a claim made clear that there was no coverage under the Policy. The district court concluded that: It therefore would not be reasonable for a third party to expect coverage for claims arising out of acts, errors, or omissions that occurred before January 1, 2104 that the third party's attorney failed to timely report to the insurer. (Doc. 62, pp. 26-27).

Initially, the district court's conclusion misinterprets the Policy which had an effective date of January 1, 2014, and an expiration date of January 1, 2015. (App., Tab. 9, Doc. 35, Ex. 8, p. 1). Pursuant to the Policy, it provides coverage only for claims made during the period of January 1, 2014 through January 15, 2014. (Emphasis added). Michelettis submitted notice of their claims to McLean, by letter dated October 16, 2014. (Doc. 30, Ex. B, attached thereto).

As set forth in their affidavits, Michelettis had no knowledge of the actions and inactions of McLean until September 2014 when they were informed that

David McLean had been suspended from the practice of law, and that the McLean law firm was dissolving. More importantly, Michelettis had no specific knowledge of the failures of McLean to properly represent their interests in the Costco case until then. Based on their reliance on McLean to represent their legal interests, including their existing attorney-client relationship with the firm, as well as their reasonable expectation that McLean would have liability insurance coverage, the district court's factually unsupported finding otherwise is incorrect.

Exclusions or words of limitation in an insurance policy must be strictly construed against the insurer regardless of any ambiguity. Wellcome v. Home Insurance Co., 257 Mont. 354, 849 P.2d 190 (1993).

The plain language of the Policy provides coverage for Michelettis' claims against McLean, regardless of the unrelated actions of David McLean, intentional or otherwise. The reasonable expectation of the Michelettis was that McLean would not be negligent in the legal representation provided, and equally reasonable belief and assumption that McLean would have the appropriate professional liability insurance policy available should it fail to do so. In point of fact, McLean did have a professional liability insurance policy in place.

The language of this Policy provides coverage for Michelettis' claims asserted within the policy period. To the extent that the Policy language conflicts with the language on which ALPS relies in denying coverage, including any false

statements of David McLean, as such concerns Michelettis, this court should find that coverage is available for their negligence claims. Under the reasonable expectations doctrine, a policy provision incorporating an application cannot create an exclusion from coverage where the terms of the insurance policy do not clearly demonstrate an intention to exclude such. Winter v. State Farm Mut. Auto. Ins. Co., 2014 MT 168, ¶ 19, 375 Mont. 351, 328 P.3d 665. When an insurance policy is ambiguous, it is to be interpreted most strongly in favor of the insured and any doubts as to coverage are to be resolved in favor of extending coverage for the insured. Mitchell v. State Farm, 2003 MT 102, ¶ 26, 315 Mont. 281, 68 P.3d 703.

The district court appears to conclude that Michelettis were third party beneficiaries, but nevertheless held that ALPS timely and properly rescinded the Policy, thereby obfuscating such.

The rule regarding the rights of third-party beneficiaries to enforce contracts is accurately summarized at Restatement (Second) of Contracts § 304 (1981), where it provides that a promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty. Harman v. MIA Serv. Contracts, 260 Mont. 67, 72, 858 P.2d 19, 22 (1992). In Restatement (Second) of Contracts § 302 (1981), beneficiaries are described as follows:

> (1) Unless otherwise agreed between promisor and promise, a beneficiary of a promise is an intended beneficiary if recognition of a

right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promise to pay money to the beneficiary; or

(b) the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised promise.

Harman, 260 Mont. 67, 72, 858 P.2d at 22-23.

Michelettis relied on McLean to pursue their claims for injuries and damages against Costco. In conjunction with such, it was reasonable for Michelettis to conclude and rely on the fact that McLean maintained the necessary professional liability insurance. The purpose of the ALPS Policy is to defend and indemnify its attorney insureds for claims resulting from professional negligence/malpractice. Michelettis submitted their claims within the coverage period established by the ALPS Policy.

Michelettis are third party beneficiaries of the ALPS Policy, and should have the right to seek damages from the ALPS Policy as the result of the negligence of its insured under the insurance contract. Id. 260 Mont. 67, 72, 858 P.2d 19, 22 (1992). As the intended beneficiary of the ALPS insurance contract, Michelettis' objectively reasonable expectations of coverage should be honored, regardless of the fact that ALPS could otherwise deny coverage for claims resulting from the intentional acts of David McLean.

As to the district court's finding that the Policy was properly rescinded, it appears that the law in Montana does not directly address an insurer's recession rights as to a professional liability policy when third-party claims are involved. However, state and federal case law concerning automobile insurance illustrates that coverage should be available to the innocent third-parties in this matter.

In McLane v. Farmers Ins. Exchange, 150 Mont. 116, 432 P.2d 98 (1967), the court failed to recognize the absolute right of an insurer to rescind against third-parties. Further, the court held that an insurer cannot affect a third-party's rights once they vest. Id. at 119, 432 P.2d at 100. In Robb v. State Farm Mut. Auto Ins. Co., 2006 U.S. Dist. LEXIS 86106, 18, the federal district court concluded that the suggestion in McLane that an insurer could rescind a policy even after an accident occurs giving rise to third-party claims was no longer valid in light of the subsequent and comprehensive changes to the statutory law of Montana governing automobile liability insurance coverage. The federal court concluded that the rescission of an automobile policy as against innocent third-parties was contrary to Montana law requiring mandatory automobile insurance of a minimum amount. Robb, at 25.

Applying the above reasoning to Michelettis' claims supports that they, as innocent third-parties, should have the benefit of the coverage provided by the Policy. ALPS's recession of the policy is based on the illegal and criminal actions

of David McLean. Absent these unrelated matters, the ALPS Policy would certainly have provided coverage for the professional negligence of McLean. In concluding that ALPS did not waive its right to rescind the Policy, and thereby deny the Michelettis the opportunity to pursue their claims based on professional negligence, the district court relied on and noted the intentional and illegal actions of David McLean to justify such.

ALPS should not be allowed to benefit from the illegal actions of its insured to deny coverage for a legitimate professional negligence claim. Applicable Montana law dictates that ALPS should provide coverage to third parties such as Michelettis. The public policy of the State of Montana to honor the reasonable expectations of consumers of insurance dictates that ALPS should be required to provide liability coverage and indemnity for the negligent acts of McLean.

There is no issue that, absent the unrelated actions of David McLean, Michelettis claim for professional negligence/malpractice would be covered under the ALPS Policy. ALPS 's reliance on the use of its policy provisions denying coverage for intentional actions by its insured have no relationship to the Michelettis' claim, for which coverage is provided by the policy. The ALPS Policy provides liability coverage for claims resulting from professional negligence/malpractice. This policy was in place at the time that the negligent acts by McLean were discovered and a claim made by Michelettis. As third party

beneficiaries, Michelettis should be afforded and allowed the benefit of the coverage provided by the ALPS Policy to McLean, and not subject to rescission of such as against David McLean.

CONCLUSION

Based on the record in this matter, and for all the reasons set forth herein, appellants Joseph F. Micheletti (deceased) and Marilyn C. Micheletti, respectfully request that the district court's judgment be reversed, and that this matter be remanded for further proceedings.

DATED this 31st day of March, 2017.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,076 words, excluding certificate of service and certificate of compliance.

DATED this 31st day of March, 2016.

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